IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E. JEAN McCRACKEN	:	**CIVIL ACTION**
TED A. McCRACKEN	:	
	:	
	:	
v.	:	**No. 03-4923**
	:	
	:	
ROBERT A. FREED, ET AL.	:	

MEMORANDUM AND ORDER

Savage, J. **January 6, 2006**

In this action brought under 42 U.S.C. § 1983, the plaintiffs allege that the defendants used excessive force when a police tactical team entered the plaintiffs' residence to execute arrest warrants. The municipal defendants, a consortium of municipalities that contribute manpower to the North Penn Tactical Response Team ("tactical team"), have moved for summary judgment, contending that the plaintiffs have failed to establish a municipal rule, custom or practice that caused a constitutional deprivation. The individual defendants, the police chief in charge of the tactical team and the participating officers, argue that they are entitled to qualified immunity because the force used was objectively reasonable under the circumstances.

The material facts are not in dispute. The plaintiffs have not identified any municipal custom, policy or practice responsible for the alleged constitutional deprivation. They have also failed to contradict the facts in the record which demonstrate that the actions of the supervisor and the members of the tactical team were objectively reasonable in the situation they confronted, entitling the individual defendants to qualified immunity.

Therefore, summary judgment will be entered in favor of all defendants.

Factual Background[1]

On Tuesday, August 28, 2001, at approximately 11:30 a.m., six police officers went to the plaintiffs' residence to serve arrest warrants upon plaintiff Ted A. McCracken ("McCracken").[2] After several unsuccessful attempts to establish communication with McCracken, whom they saw through a window and heard lock the front door, the officers sought defendant Robert A. Freed's ("Freed") direction.[3] After assessing the situation upon his arrival, Freed, the Chief of the Upper Gwynedd Police Department and official in charge, activated the tactical team.[4]

The officers next attempted to contact McCracken via telephone at approximately 1:50 p.m.[5] Over the course of the next thirty minutes, Detective Steven Ford, the tactical team's trained hostage negotiator, repeatedly telephoned the McCracken residence and each time either left a message on the answering machine or received a busy signal.[6] At approximately 2:30 p.m., three hours after the officers first arrived, and having received no response from McCracken or anyone in the house, Freed authorized the tactical team to forcibly enter the house.

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[1] In support of their motions, the defendants submitted joint exhibits, which contain official reports, records and other documents kept in the course of regularly conducted business.

[2] *Upper Gwynedd Incident Report* (Aug. 28, 2001) (Joint Exhibits of Defendants, Ex. E-1) (Document No. 88) ("Ex.").

[3] *Id.*

[4] *Id.*

[5] *Aff. of Ret. Detective Sergeant Steven Ford* ¶¶ 5-6 (Dec. 17, 2004) (Ex. F-1).

[6] *Id.*

The tactical team created a diversion at the front of the residence and entered through the rear. Pepper spray canisters[7] were tossed through the front windows the officers had broken while a group of officers simultaneously entered through a pried back door. Once inside, the officers quickly apprehended McCracken and immediately removed plaintiff E. Jean McCracken ("Jean McCracken") from the premises.

Paramedics treated the McCrackens on the scene for superficial injuries and exposure to pepper spray. McCracken refused any further medical treatment.[8] McCracken was transported to the local police station where he was processed and booked.[9]

Procedural History

In their *pro se* complaint, the plaintiffs, son and mother, allege that the tactical team, under Freed's direction, used excessive force in entering their residence at 15 Derry Road in North Wales, Pennsylvania. The redundant nine-count complaint repeatedly alleges that the defendants used excessive, unnecessary and/or deadly force in attempting to serve arrest warrants upon McCracken. The plaintiffs named as defendants nine municipalities, Freed and several "John Does." No individual officers were identified in the original complaint.

The municipalities which did not contribute personnel to the tactical team on the day of the incident, defendants Horsham Township, Lower Gwynedd Township, Whitpain

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[7] During Freed's deposition and again at oral argument, McCracken insisted that the tactical team used tear gas during the entry. However, Freed stated that pepper spray and not tear gas was used. *Freed Dep. Tr. May 27, 2005* at 39, 67. The plaintiffs have produced no evidence to support McCracken's speculative assertion that tear gas was used.

[8] *Aff. of Jeff Mullaly* (Dec. 17, 2004) (Ex .P-1).

[9] *Upper Gwynedd Incident Report* (Aug. 28, 2001) (Ex. E-1).

Township, and the Borough of North Wales, were dismissed from the case, leaving only the participating municipalities, Hatfield Township, the Borough of Lansdale, Montgomery Township, Towamencin Township and Upper Gwynedd Township, and Freed as defendants.[10] The individual tactical team officers, originally named as John Does in the complaint, were identified during discovery and later added on December 22, 2005.[11] All defendants have now moved for summary judgment.[12]

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In examining the motion, we must view the facts in the light most favorable to the nonmovants and draw all reasonable inferences in their favor. *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact. FED. R. CIV. P. 56(c). Once the movant has done so, the opposing parties cannot rest on the pleadings. To defeat summary judgment, they must come forward with probative evidence establishing the *prima facie* elements of their claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The nonmovants must show more than the "mere existence of a scintilla of evidence" for

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[10] *Order*, Civ. No. 03-4923 (Jan. 21, 2005) (Document No. 96); *Order*, Civ. No. 03-4923 (Jan. 21, 2005) (Document No. 97).

[11] Order, Civ. No. 03-4923 (Dec. 22, 2005) (Document No. 176). The added defendants were deemed to have joined in the motions for summary judgment.

[12] The complaint names the individual defendants in both their official and individual capacities. An action against an individual in his official capacity is not actionable. *See generally Hafer v. Melo*, 502 U.S. 21 (1991).

elements on which they bear the burden of production. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). An inference based upon speculation or conjecture does not create a material fact. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

In support of their motion, the defendants have presented statements of material facts they contend are undisputed. The plaintiffs' statement of undisputed facts contains irrelevant and unsupported allegations and mischaracterizations of Freed's deposition testimony. Instead of challenging the defendants' statement of facts, the plaintiffs' focus on an alleged conspiracy to force McCracken to accept a settlement in a personal injury lawsuit orchestrated by Ford Motor Company, an insurance company, McCracken's former attorney, Freed and attorneys from the Montgomery County District Attorney's office.[13] However, the plaintiffs' belated motions to amend the complaint to include the conspiracy claim were denied. The plaintiffs' responses to the facts directly related to the claims in the original action are incomprehensible and address immaterial issues, for example, the physical requirements of police officers and the lack of diversity in the police force.[14] The plaintiffs, in their "responsive" statement of facts, do not cite to contradictory facts in the

[13] *Pl. Mot. for Leave to File an Am. Compl.* (Document No. 128); *Pl. Mot. to Amend/Correct the Compl.* (Document No. 143).

[14] *Pl. Resp. Stmt. of Undisputed Facts* ¶ 17.

record, nor do they dispute facts that are fatal to their causes of action. [15] Furthermore, they do not question the credibility of any deponent. In short, they do not raise issues of material fact, leaving only the undisputed facts.[16]

Municipal Liability

In the complaint, the plaintiffs premise their municipal liability claim on theories of failure to properly train the tactical team officers in the constitutional use of deadly force and failure to equip them with alternatives to lethal weapons. Indisputably, neither deadly force nor lethal weapons were employed. As now argued in their response to the motions, the plaintiffs' sole theory of municipal liability is that the defendant municipalities lacked a coherent written tactical team policy and inadequately trained the officers assigned to the tactical team.[17]

A municipality cannot be liable for damages under § 1983 on a vicarious liability theory. *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) (citing *Monell*

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[15] Paragraph 6(c) of the Scheduling Order states that "[a]ll material facts set forth in the Statement of Undisputed Facts required to be served by the movant shall be taken by the Court as admitted unless controverted by the opposing party." (Document No. 7).

[16] At the initial scheduling conference and several times throughout the course of the litigation, I advised the plaintiffs to seek the assistance of an attorney. McCracken has repeatedly spurned my advice. Thus, the plaintiffs have proceeded *pro se* throughout this litigation, with McCracken "representing" the interests of both.

While courts traditionally afford *pro se* litigants deference, plaintiffs who choose self-representation must still comply with all relevant rules of procedural and substantive law. *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975); *Martinez-McBean v. Gov't of Virgin Islands*, 562 F.2d 908, 912-13 (3d Cir. 1977) (quoting *Faretta*). Plaintiffs ignored my repeated suggestions to retain counsel. Consequently, I have no obligation to assume the plaintiffs meant something they did not say when they have chosen to represent themselves. *See Eagle Eye Fishing Corp. v. U.S. Dept. of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994); *Peebles v. Moses*, No. Civ. 639/1993, 1999 WL 117764 (V.I. Feb. 19, 1999). A plaintiff who deliberately chooses to represent himself and rebuffs advice to seek legal assistance should not be permitted to impose upon the court an obligation to raise issues and arguments on his behalf. Nevertheless, although under no obligation to do so under these circumstances, I have considered the plaintiffs' complaint and pleadings deferentially.

[17] *Oral Arg. Tr. May 2, 2005* at 16-17.

v. Dept. of Soc. Servs., New York City, 436 U.S. 658, 694-95 (1978)). It may, however, be liable for a constitutional deprivation that is directly caused by a municipal policy, custom or practice. *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214-15 (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

To prevail, plaintiffs must identify a municipal policy or custom that reflects a conscious choice of policymaking officials that amounts to deliberate indifference to the rights of the people with whom they come into contact. *Carswell*, 381 F.3d at 244. Then, they must also demonstrate that the inadequate training caused a constitutional violation. *Id*.

A direct causal link can be established by either showing that an official policy statement, ordinance or regulation caused the constitutional deprivation, or that the constitutional deprivation was caused by a custom or a persistent practice. *Brown*, 269 F.3d at 215. To survive summary judgment on a failure to train theory, the plaintiffs must present evidence that the need for more or different training was so obvious that the policymaker's failure to respond amounts to deliberate indifference. *Id.* at 216. They have not done so.

Failure to Train

The plaintiffs offer no support for their bald assertions that the tactical team's policies and training were inadequate or constitutionally deficient. Similarly, they do not dispute that Pennsylvania police officers are certified on a yearly basis. Instead, they argue that the Pennsylvania police officer training and certification program is inadequate because Freed permitted "physically unfit" officers to execute the arrest warrant. As they say in support of their failure to train claim:

> The reliability of that certification process is debatable when an obese officer, over 75 lbs. his normal is certified. . . . Freed repeatedly refused to answer questions of hiring women, minorities, and his retention of overweight, physically unfit officers who on August 28, 2001, were physically unfit for the rigors of executing a simple arrest warrant . . . .[18]

Contrary to the plaintiffs' contentions, the municipal defendants' police departments have written tactical team policies; and, officers assigned to the tactical team must not only complete a qualifying training program but must also participate in continuing SWAT training. The written tactical team policy, which had been ratified by the chiefs of police of all participating police departments,[19] dictates that the officers may use no more than the minimum force necessary to effect an arrest or serve a warrant, and to ensure the safety of the suspect, the officers involved and the surrounding community.[20]

All tactical team officers must complete special SWAT training in addition to their regular police training. In Pennsylvania, all police officers are required to attend annual certification training by the Municipal Police Officers' Education and Training Commission.[21] Tactical team members are required to take an additional 40 hour course and monthly training.[22] There is also an annual two-day training session. An officer may be assigned to an individualized training school fitted to his/her particular function within the tactical team.[23] As of August 28, 2001, all members of the tactical team had fulfilled the requisite

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[18] *Pl. Resp. Stmt. of Undisputed Facts* ¶ 23.

[19] *Freed Dep. Tr. May 10, 2005* at 17.

[20] *Freed Dep. Tr. May 10, 2005* at 27, 38.

[21] *Freed Dep. Tr. Nov. 12, 2004* at 34; *Freed Dep. Tr. May 10, 2005* at 49.

[22] *Freed Dep. Tr. May 10, 2005* at 44-45; 76-79.

[23] *Freed Dep. Tr. May 10, 2005* at 44-45; 76-79.

training requirements and had been certified.[24] The plaintiffs do not dispute these facts.

The tactical team followed established policy. Freed determined that McCracken's actions satisfied four of the "high risk" criteria listed in the policy: barricaded person, hostage situation, high risk arrest involving possible violence, and execution of a warrant on a known dangerous criminal.[25] Overall, the plaintiffs offer no evidence to support a jury finding that the tactical team's policies were obviously inadequate. Based on the wealth of undisputed evidence presented by the defendants, the record clearly fails to establish deliberate indifference or causation. Rather, it demonstrates the existence of a written policy designed to guide the police in the proper use of force.

Failure to Equip

Even if we accept the plaintiffs' arguments that pepper spray and flash bangs constitute "lethal" force, the defendants still can not be liable. A municipality can not be held liable for failing to equip its officers with non-lethal weapons. *Carswell*, 381 F.3d at 245. In other words, a municipality can not be second guessed on the type of equipment it provides its officers. *Id*. (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150-51 (7th Cir. 1994)). Contrary to the plaintiffs' contentions, the Constitution does not mandate the type of equipment a police department must provide to its officers. *Carswell*, 381 F.3d at 245.

At oral argument, the plaintiffs repeatedly pressed the notion that the defendants could have avoided using pepper spray by kicking in the front door or using a battering ram to break down the front door.[26] Either one of these options could have exposed the officers

[24] *Freed Dep. Tr. May 10, 2005* at 76.

[25] *Freed Dep. Tr. May 10, 2005* at 15.

[26] *Oral Arg. Tr. May 2, 2005* at 53-54.

to a potentially dangerous person poised to react violently. The method used temporarily and safely disabled the suspect.

Because the plaintiffs can not identify any municipal custom, policy or practice which could have caused any alleged deprivation, judgment must be entered in favor of the municipal defendants.

Excessive Force

An excessive force claim is analyzed under the Fourth Amendment and requires the plaintiffs to show that an unreasonable seizure occurred. *Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004). Police may enter a suspect's residence to make an arrest pursuant to an arrest warrant if they have probable cause to believe that the suspect is in the home. *United States v. Agnew*, 407 F.3d 193, 196 (3d Cir. 2005). They may not intrude a third-party's home to serve an arrest warrant on a non-resident suspect because the Fourth Amendment protects the third-party owner's interest. *Id*. at 196-97. To arrest a suspect in someone else's residence requires, absent exigent circumstances, a search warrant. *Steagald v. United States*, 451 U.S. 204, 211-12 (1981).

The interests of the plaintiffs are separate and distinct, one as a suspect and the other as a third-party owner. Both plaintiffs resided at the address. The police personally observed McCracken inside, but did not know if Jean McCracken was there. Because Derry Road was McCracken's address, a fact that is not in dispute, entry to arrest him was permissible because the police were acting pursuant to a valid arrest warrant. Had not her son been in the house and the police had not had probable cause to believe he was there, Jean McCracken would have had a legitimate interest against the intrusion. As a joint resident, however, she cannot complain about the entry itself, especially where she did not

respond to the police presence and the attempted communications.

That the police had a legal right to enter the residence to execute the arrest warrants does not end the inquiry. They were, nevertheless, not entitled to use any amount of force. The plaintiffs still had a constitutional right to be free from the use of excessive force. Thus, the analysis now turns to the reasonableness of the police actions.

Whether the force used was reasonable is usually a jury question. *Rivas*, 365 F.3d at 198. Summary judgment, however, may be granted where, after resolving all factual disputes in favor of the plaintiffs, the court concludes that "the officers' use of force was objectively reasonable under the circumstances." *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999). What is "objectively reasonable" is evaluated by looking at the force in the full context of the circumstances leading up to its use. *Id.* at 292. The claim must be evaluated from the perspective of a reasonable officer on the scene without the benefit of hindsight. *Rivas*, 365 F.3d at 198. The touchstone of the excessive force inquiry is whether the officers' actions were objectively reasonable in light of the facts and circumstances facing the officers, regardless of their intent or motivation. *Id*.

Considering whether the use of force is "objectively reasonable" requires an analysis of the *Sharrar* factors. They are: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the police officers or others; (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; (4) whether the force applied was of such an extent as to lead to injury; (5) whether the suspect is violent or dangerous; (6) the possibility that the suspect may be armed; (7) the duration of the action; and (8) the number of persons with whom the police must contend at one time. *Sharrar v. Felsing*, 128 F.3d 810, 821-22 (3d Cir. 1997) (citing *Graham v. Connor*, 490 U.S.

386, 396 (1989)) (reiterating the analysis to be undertaken in evaluating the qualified immunity defense in the excessive force context).

The first and third factors were absent or, at the least, marginal in this case. The remaining factors gave Freed reasonable bases to first deploy and then to use the tactical team.

Severity of Crimes and Resisting Arrest Factors

The crimes for which McCracken was being arrested were not severe. They were not crimes of violence. Although McCracken was not responding to the police, he was not actively resisting arrest nor attempting to flee. He was, however, evading the police.

Immediate Threat & Violent Criminal History Factors

Although McCracken was not posing an obvious immediate threat to the safety of the officer or others, Freed could have reasonably perceived him as presenting a potential threat because he had a history of gun possession, murder, rape and assault that would have led Freed to contemplate him as violent and dangerous, and to infer that he might be armed.

The plaintiffs do not contest that Freed knew the following information about McCracken's criminal history before deploying the tactical team. On October 12, 1977, McCracken was sentenced to 20 years in prison in New York for attempted murder, two counts of rape, two counts of sodomy and burglary.[27] He was paroled on June 26, 1990, and later re-committed for an additional twenty-four months for a parole violation. After he was re-paroled on July 13, 1992, he violated his parole again and fled to Canada, where

[27] *Commitment to the State Department of Correction* (Oct. 12, 1977) (Ex. D).

he was eventually captured.[28] When he was finally released from custody in New York on April 9, 1997, he was required to register as a sex offender under Megan's Law.[29]

On November 10, 1997, plaintiff Jean McCracken filed an assault charge against McCracken with the Hatfield Township Police Department, claiming that her son had choked and injured her.[30] The following day, while providing protection for Jean McCracken at her request,[31] a Hatfield Township police officer arrested McCracken for assault.[32]

On January 5, 1998, the Lansdale Police Department was notified by the New York Department of Corrections that McCracken was under investigation for mailing inappropriate materials to a female employee at a correctional facility in New York state.[33] The incident report recites that New York had identified McCracken as a serious sex offender.[34]

On February 8, 1999, the Pennsylvania State Police alerted both the Upper Gwynedd and Lansdale Police Departments that, in violation of Megan's Law, McCracken had failed to register as a sex offender and had been identified by New York authorities as

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[28] *State of New York Division of Parole First Supplemental Violation of Release Report* (Sept. 16, 1992) (Ex. E).

[29] *Wende Correctional Facility Discharge* (Apr. 9, 1997); *Sex Offender Registration Form* (Apr. 9, 1997) (Exs. F, G).

[30] *Hatfield Township P.D. Offense/Incident Report* (Nov. 10, 1997*)* (Ex. J).

[31] *Hatfield Township P.D. Offense/Incident Report* (Nov. 11, 1997) (Ex. K).

[32] *Id*.

[33] *Lansdale Police Dept. Incident Report* (Jan. 5, 1998) (Ex. L).

[34] *Id.*

posing the highest level of risk.[35] Upper Gwynedd Police Sergeant Steven Gillen, conducting a residency search, located McCracken living with his mother at 15 Derry Road in North Wales, Pennsylvania.[36]

The following day, Sergeant Gillen, together with Officer Townshend of the Upper Gwynedd Police Department, visited McCracken at the Derry Road residence and informed him of his obligation to register under Megan's Law.[37] According to the police report, McCracken told the officers that he would comply. McCracken subsequently notified New York authorities of an address change,[38] listing an Elkington, Maryland address as his home address.[39]

On May 10, 2000, McCracken was arrested, for carrying a loaded concealed weapon into a bank in Elkton, Maryland.[40] He was remanded to the custody of the Cecil County Detention Center and later released on bond.[41]

The plaintiffs argue that Freed should have investigated McCracken's criminal history prior to ordering the entry because he would have learned that the charge which was the subject of the arrest warrant was a nonviolent administrative felony. It was not the nature of the charges for which McCracken was wanted that concerned Freed. It was

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[35] *Id.*

[36] *Upper Gwynedd Incident Report* (Feb. 9, 1999) (Ex. P).

[37] *Id.*

[38] *Id.*

[39] *Aff. of Pamela G.S. Gaitor, Senior Training Technician in the New York State Sex Offender Registry* (May 25, 2001) (Ex. Q).

[40] *Elkton Police Department Incident Report Form* (May 10, 2000) (Ex. V).

[41] *Id.*

McCracken's history of violence and having weapons.

Force Used Factor

Although it appeared to be overwhelming, the force used was not likely to produce serious injury. On the contrary, it was calculated to avoid inflicting physical injury, other than temporary tearing of the eyes, while permitting the police to take custody of McCracken without physically harming him or others.

During the entry, the police officers discharged canisters, containing naturally occurring oleoresin capsicum which temporarily disables people by causing teary discharges.[42] Immediately afterwards, Jean McCracken was treated for coughing.[43] McCracken refused an offer of assistance.[44] At oral argument, the plaintiffs asserted that they have had lingering throat problems caused by the exposure.[45] However, neither produced physician's reports documenting any residual problems caused by their exposure to pepper spray.[46] In apprehending McCracken, the police caused minimal property damage and no physical injury except temporarily exposing the McCrackens to an eye irritant.

Duration of Time Factor

The situation did not change dramatically during the time from when Freed activated the tactical team to when he actually employed it. The police did not rachet up their activity

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[42] *Freed Dep. Tr. May 27, 2005* at 39.

[43] *Aff. of Christopher Worthington* (Dec. 20, 2004); *Aff. of Jeff Mullaly* (Dec. 17, 2004) (Exs. O-1, P-1).

[44] *Id.*

[45] *Oral Arg. Tr. May 2, 2005* at 14.

[46] *Oral Arg. Tr. May 2, 2005* at 14-15.

nor did McCracken do anything menacing that the police could observe. Yet, the concerns of the police reasonably intensified. The overwhelming presence of the tactical team did nothing to persuade McCracken to exit the house or to respond. At the same time, Freed knew that McCracken, who had a history of violence and had been accused of assaulting his mother, was in the residence he shared with her. Freed and the team reasonably believed that McCracken posed a serious threat to his mother who had accused him of assaulting her in the past. They also reasonably believed that they were dealing with a potential hostage situation. According to the neighbors, the McCracken residence had been fortified. Furthermore, with time closing in on the end of the school and work day, Freed was concerned about an increasing number of the public being exposed to a potentially explosive situation.

Under the circumstances, balancing the *Sharrar* factors, a police officer in Freed's situation can not be said to have acted in an objectively unreasonable manner. The undisputed material facts are that the defendant officers went to the plaintiffs' residence to serve valid warrants. They knew that McCracken was a convicted violent felon, had been accused of assaulting his mother who the police suspected was in the house, and had an open weapons charge. Several police officers had encountered McCracken during past incidents. Thus, Freed and the officers were not dealing with an unknown, but rather a person with a documented violent criminal history.

When McCracken did not answer his door, the officers notified Freed, who activated the tactical team based on his consideration of McCracken's past criminal history and for Jean McCracken's safety. The police negotiator repeatedly attempted to coax McCracken out of the residence. After receiving no response for three hours, Freed determined that

the safety of the surrounding residents and Jean McCracken demanded timely action by a forceful entry to apprehend McCracken.

The reasonableness of the force used is normally an issue for the jury. *Rivas*, 365 F.3d at 198.[47] Therefore, even though the undisputed evidence submitted by the defendants and unchallenged by the plaintiffs demonstrates that the officers' actions were objectively reasonable in light of the potentially explosive situation, I shall proceed to the immunity issue as if the force used was excessive because the inquiry for qualified immunity is distinct from the one for considering whether there was a constitutional violation of excessive force. *Forbes*, 314 F.3d at 148.

Qualified Immunity

A police officer sued for a constitutional violation may be entitled to qualified immunity, that is, exemption from trial and liability. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Qualified immunity is a question of law to be decided by the court. *Doe v. Groody*, 361 F.3d 232, 238 (3d Cir. 2004). Considering a qualified immunity defense, the court must review the law implicated by the officer's behavior and determine whether the officer could have believed that his actions were justified by law. *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 148 (3d Cir. 2002). Thus, there are two steps in determining whether an officer is entitled to qualified immunity. *Bennett v. Murphy,* 274 F.3d 133, 136 (3d Cir. 2002) (citing *Saucier*).

At the first step, the court must decide whether the facts, taken in a light most

[47] The decision to activate the tactical team required a heightened degree of caution because the tactical team had the capability to make an overwhelming show of force. *Estate of Smith v. Marasco*, 318 F.3d 497, 518 (3d Cir. 2003) (quoting *Holland v. Harrington*, 268 F.3d 1179, 1190-95 (10th Cir. 2001)).

favorable to the plaintiff, demonstrate that a constitutional violation has occurred, and then determine whether that right was so clearly established at the time of the action that a reasonable officer would have understood that his conduct violated the plaintiff's constitutional rights. *Carswell*, 381 F.3d at 241-42. If the officer's actions did not violate a clearly established statutory or constitutional right which a reasonable person would have known, the inquiry ends and the officer is shielded from liability. *Carswell*, 381 F.3d at 242 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The relevant inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier*, 533 U.S. at 202. In excessive force cases, qualified immunity is appropriate if an officer's use of force was objectively reasonable under the circumstances. *Gilles v. Davis*, 427 F.3d 197, 202-03 (3d Cir. 2005).

If a plaintiff establishes that an officer violated a clearly established constitutional right, the court then proceeds to the second step and evaluates whether the officer made a reasonable mistake as to what the law required. *Carswell*, 381 F.3d at 242. "If an official could have reasonably believed that his or her actions were lawful, the official receives immunity even if in fact the actions were not lawful." *Forbes*, 313 F.3d at 148. The officer may still be entitled to immunity if he is mistaken as to what the law requires. Even if the force may have been excessive, if the officer's mistake as to what the law required is reasonable, the officer is entitled to the immunity defense. *Carswell*, 381 F.3d at 242.

Freed and all of the defendants were acting on two valid arrest warrants issued

pursuant to affidavits of probable cause.[48] The affidavits were sworn by two different officers, and the warrants were issued by different magistrates. The plaintiffs do not suggest that the affidavits of probable cause relied upon in the issuance of the warrants were false or otherwise improper. The defendants had no information nor was there any that the warrants were invalid. Indeed, the plaintiffs do not challenge the validity of the warrants.

When Freed arrived at the scene, he was aware of McCracken's extensive criminal background and knew that McCracken was in the house where his mother also lived.[49] Specifically, Freed knew that McCracken had been convicted of rape, sodomy and attempted murder in New York; he had been accused of attempting to kill his accuser while out on bail on those charges; he was designated as a serious sex offender; he had an outstanding weapons charge in Maryland; and, that Jean McCracken had filed a prior criminal complaint against him for assault.[50] Because McCracken, whom the officers saw through the front window, refused to respond to the officers' attempts to serve the arrest warrants, and taking into consideration McCracken's criminal history and Jean

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[48] On May 18, 2001, when McCracken was stopped in Lansdale for suspected prowling and loitering, he gave 15 Derry Road as his home address. *Lansdale Police Department Incident Report Form* (May 18, 2001) (Ex. W). A warrant for his arrest on the loitering and prowling charges was issued on June 6, 2001. *Id.*

Upon learning during the May 18 prowling investigation that McCracken was again residing in Pennsylvania, the Upper Gwynedd police commenced an investigation into McCracken's obligations to register under Pennsylvania's Megan's Law. On May 23, 2001, the Pennsylvania State Police confirmed that McCracken was not registered as a sex offender in violation of Megan's Law, a third degree felony. *Memo from Sergeant Nancy Sheehan, Megan's Law Section May 23, 2001* (Ex. Y). Based on McCracken's failure to register, Detective James Pifer of the Upper Gwynedd Police Department filed an affidavit of probable cause for McCracken's arrest. *Affidavit of Probable Cause* (Aug. 16, 2001) (Ex. Z). A warrant was issued. *Commonwealth of Pennsylvania Warrant of Arrest* (Aug. 17, 2001) (Ex. D-1).

[49] *Freed Dep. Tr. May 27, 2005* at 73-76.

[50] *Id*.

McCracken's potential presence in her home, Freed believed he was facing a potential hostage or barricade situation.[51] He then decided to activate the tactical team.

The plaintiffs do not dispute any of the facts presented by the defendants with respect to what Freed knew about McCracken or how the situation appeared. Nor do they present contrary evidence or challenge the authenticity of the documents submitted by the defendants.[52] In fact, at oral argument, McCracken conceded that his criminal history was part of his official record that had been available to Freed.[53]

We need not reach the second step of the qualified immunity inquiry because no rational jury could find, when viewing all the evidence in the light most favorable to the plaintiffs, that the individual defendants' conduct was objectively unreasonable under the circumstances.

The officers who participated in the entry of the residence are entitled to immunity because they took instructions from Freed whose directions were objectively reasonable. Freed made the decisions to activate the tactical team and to breach the plaintiffs' residence.[54] While simply following orders is not a defense, instructions from a superior officer can support qualified immunity when the officer could conclude, from an objective view of the surrounding circumstances, that there was legal justification for the action. *Harvey v. Plaints Twp. Police Dep't*, 421 F.3d 185, 199 (3d Cir. 2005) (Becker, J.,

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[51] *Freed Dep. Tr. May 27, 2005* at 15, 23.

[52] McCracken, in an unsupported statement, contends that the New York authorities never informed him of his obligation to register, and that he did not mislead the Pennsylvania State Police. *Pl. Stmt. of Undisputed Facts* ¶ 6. But, his disputes are immaterial.

[53] *Oral Arg. Tr. May 2, 2005* at 45-49.

[54] *Freed Dep. Tr. May 27, 2005* at 21-22.

dissenting). Police officers called upon to aid in the execution of arrest warrants are entitled to assume that the magistrate was provided the necessary information to support the judicial assessment of probable cause. *Berg*, 219 F.3d at 261 (quoting *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971)). The tactical team was activated by Freed, based on his personal observation of the situation, McCracken's past criminal record and his assessment of the two outstanding arrest warrants.[55] Thus, it follows that all members of the tactical team are entitled to qualified immunity because they followed Freed's objectively reasonable instructions.

The decision to activate a tactical team can constitute excessive force if it is not objectively reasonable in light of the totality of the circumstances. *Estate of Smith v. Marasco*, 430 F.3d 140, 149-50 (3d Cir. 2005). Even if Freed had made a mistake in activating the tactical team, it was one a reasonable police supervisor faced with a similar scenario could have made. Thus, Freed is entitled to qualified immunity with respect to his decision to activate the tactical team.

Likewise, with respect to using the team to forcibly enter the residence, Freed is entitled to qualified immunity because the facts, viewed in a light most favorable to the plaintiffs, demonstrate that the force he authorized was objectively reasonable under the circumstances. Only after the initial attempts to execute the arrest warrants by knocking on McCracken's front door and the subsequent attempts to communicate with him were unsuccessful, did Freed approve a forced entry, and then only after his consideration for the safety of Jean McCracken, the officers and the neighbors. Because it was a weekday,

[55] *Freed Dep. Tr. May 27, 2005* at 25-28.

he realized that most residents would start returning home at soon and he wanted to resolve the situation before more people were potentially exposed to danger.[56] In sum, the police action was a reasonable response to the threat perceived.

The plaintiffs argue that Freed should have utilized alternative methods to apprehend McCracken. However, staking out the house and waiting for McCracken to emerge would not have alleviated Freed's mounting concern for the potential danger to Jean McCracken and the neighbors.[57] Furthermore, entry into a residence to serve arrests warrants does not violate the Fourth Amendment if the police have probable cause to believe that the suspect is in his or another's home. *Agnew*, 407 F.3d at 196-97. McCracken had given this address as his residence on prior occasions, and the officers knew he was there.

It was objectively reasonable to authorize forcible entry into the McCracken residence to execute the arrest warrants in light of all the circumstances. Utilizing the tactical team was reasonable because Freed was aware of McCracken's criminal profile, he believed that Jean McCracken may have been in the house, and he was concerned for her safety as well as that of the surrounding community and the officers. Finally, the tactical team employed the minimum level of force available to it while balancing the other circumstances. Therefore, Freed and the team members are entitled to qualified immunity.

Conclusion

The plaintiffs have failed to demonstrate that there was any municipal practice,

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[56] *Freed Dep. Tr. Nov. 12, 2004* at 18.

[57] *Freed Dep. Tr. Nov. 12, 2004* at 19.

policy or custom that caused any constitutional deprivation. Accordingly, they cannot make out a *prima facie* case of § 1983 liability against the municipal defendants. Considering the entire spectrum of events leading up to the forcible entry into the plaintiffs' residence, I cannot conclude, nor could a rational jury, that Freed applied the *Sharrar* factors in an unreasonable manner in deploying and using the tactical team. Even if his decisions and those acting upon them were objectively unreasonable, a reasonable officer would not have thought his conduct was unlawful. Therefore, summary judgment will be entered in favor of all defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E. JEAN McCRACKEN	:	**CIVIL ACTION**
TED A. McCRACKEN	:	
	:	
	:	
v.	:	**No. 03-4923**
	:	
	:	
ROBERT A. FREED, ET AL.	:	

ORDER

AND NOW, this 6th day of January, 2006, upon consideration of the Motion of Defendants, Lansdale Borough, Officer David Gori and Officer Christine Butler for Summary Judgment (Document No. 84), the Motion of Defendants, Upper Gwynedd Township and Chief Robert A. Freed for Summary Judgment (Document No. 85), the Motion of Defendants, Towamencin Township, Hatfield Township, Officer John Cuttrone and Detective Patrick Hanrahan for Summary Judgment (Document No. 86), the Order dated December 22, 2005, and the plaintiffs' responses and after oral argument, it is **ORDERED** that the motions are **GRANTED** and **JUDGMENT IS ENTERED** in favor of the defendants and against the plaintiffs.

/s/
TIMOTHY J. SAVAGE, J.